No. [redacted] 43

In the Supreme Court of the United States

OCTOBER TERM, 1953

THE TEE-HIT-TON INDIANS, AN IDENTIFIABLE GROUP OF ALASKA INDIANS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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CITATIONS

299551—54——1

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OPINION BELOW

The opinion of the Court of Claims (R. 16–32) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on April 13, 1954 (R. 33). The petition for a writ of certiorari was filed on April 19, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

1. Whether the taking of the unrecognized Indian right of occupancy or "original Indian

title" is compensable without specific legislative direction to make payment.

2. Whether Congress has recognized any legal rights in petitioner to the Alaskan lands here involved.

TREATY AND STATUTES INVOLVED

Pertinent portions of the Treaty of June 20, 1867, 15 Stat. 539, and the Joint Resolution of August 8, 1947, 61 Stat. 920, are set out in the Appendix, *infra*, pp. 12–14. Pertinent portions of other statutes are set out in the Discussion, *infra*.

STATEMENT

On August 29, 1951, acting pursuant to the Joint Resolution of August 8, 1947, 61 Stat. 920, the Secretary of Agriculture entered into a contract for the sale to Ketchikan Pulp & Paper Company of all merchantable timber available to June 30, 2004, in a specified area of the Tongass National Forest in southeastern Alaska (R. 31–32). Thereupon, this proceeding was instituted by petitioner on the theory that it from "time immemorial continually used, occupied and claimed" the entire area covered by the contract, that its rights to the land had been confirmed and recognized by Congress, and that the execution of the contract constituted a taking *pro tanto* of its rights in the area (R. 1–3).[1] The Gov-

[1] The jurisdiction of the Court of Claims rests upon 28 U. S. C. 1505 (originally section 24 of the Indian Claims

ernment's answer (R. 3–6) *inter alia* denied that petitioner had any collective or group rights in the area and asserted that its possession of the area, if it existed, was not of such a nature as to give rise to a cause of action against the United States for a taking under the Constitution.

Upon petitioner's motion and pursuant to its Rule 38 (b), the court below directed a separate trial as to six issues of law and any related issues of fact (R. 6–8), "the solution of which might make unnecessary the taking of voluminous evidence as to use, occupation, possession and value of large and remote areas in Alaska" (R. 17).[2] At the present time, only the following three issues (R. 7) are of any materiality:[3]

Commission Act of August 13, 1946, 60 Stat. 1049, 1055), as follows:

"The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."

Thus, the jurisdiction conferred had reference to tribal claims only, and not to claims of individual Indians.

[2] The area claimed by petitioner comprised 352,800 acres of land and 150 square miles of water (R. 1, 27–28). There are approximately 60 members in the petitioning group (R. 2, 30).

[3] In disposing of the first issue the Court of Claims held that petitioner was an "identifiable group" of Indians within

2. What property rights, if any, would plaintiff, after defendant's 1867 acquisition of sovereignty over Alaska, then have had in the area, if any, which from aboriginal times it had through its members, their spouses, in-laws, and permittees used or occupied in their accustomed Indian manner for fishing, hunting, berrying, maintaining permanent or seasonal villages and other structures, or burying the dead?

3. What such rights, if any, would have inured to it under the Act of May 17, 1884, 23 Stat. 24, in the area, if any, which on that date was either so used or occupied by it or was claimed by it?

4. What such rights, if any, would have inured to it under the Act of June 6, 1900, 31 Stat. 321, 330, in the area, if any, which on that date was so used or occupied by it?

Issue 2 was designed to test the Government's contention that whatever interest petitioner may have had in the lands during the Russian sovereignty had been extinguished by the 1867 treaty whereby Alaska was ceded to the United States. Being doubtful as to the effect of the treaty upon "original Indian title", the Court of Claims

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the meaning of 28 U. S. C. 1505 (R. 17–18, 32), and this holding is not being challenged here (see Pet. 2). The fifth and sixth issues, involving the questions whether, assuming the establishment of property rights, such rights had been abandoned, or, if not, had been taken by the execution of the contract, were not answered by the Court of Claims in view of its disposition of the issues quoted in the text (R. 25–26, 32).

did not answer the question as posed (R. 19, 20–23, 32). Instead, it held that, even assuming a tribal property interest of petitioner survived the treaty, it was substantially identical in nature with "original Indian title" or "Indian right of occupancy," as those terms are understood in relation to the interests of Indian tribes residing within the 48 States (R. 18–19). And in reliance upon this Court's statement in *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 106, and decision in *United States* v. *Alcea Band of Tillamooks*, 341 U. S. 48, the court held that petitioner would still not have a right in the land, as against the United States, unless Congress had recognized petitioner's interest as a legal interest (R. 19–20, 32). It was also concluded that legislation relied upon by petitioner did not constitute a recognition by Congress of any legal rights in the petitioning tribe to the lands in controversy, but rather indicated an awareness that there is a legal dispute as to the question of ownership (R. 22–25, 32). Consequently, upon the Government's motion (R. 32–33), the cause was dismissed (R. 33).

DISCUSSION

1. Reasoning from findings as to the mode of living of petitioner's ancestors and their relations with the Russian government prior to the cession of 1867 (R. 26–30),[4] the court below concluded

[4] Petitioner does not challenge these findings.

that the tribal interest prior to 1867 in the Alaskan lands at issue was substantially identical in nature with that of Indian tribes residing in the 48 States, *i. e.*, what is called "original Indian title" or "Indian right of occupancy" (R. 18–19, 32). It is now clear that, even if such "original Indian title" survived the cessation of Alaska, it is not such an interest in land as would be compensable under the Constitution unless it had been "recognized" in some manner by Congress.

Prior to its decision in *United States* v. *Tillamooks*, 329 U. S. 40, 42, 44, this Court had never passed upon the question of the compensability of "unrecognized" original Indian title. The opinion of Chief Justice Vinson in that case was interpreted as a holding that "original Indian title" was compensable. *Miller* v. *United States*, 159 F. 2d 997, 1001, 1005 (C. A. 9). However, in a footnote to its opinion in *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 106, this Court disagreed, in part,[5] with that opinion and stated that the opinion in the *Tillamooks* case did not hold "the Indian right of occupancy compensable without specific legislative direction to make payment." And in a still later opinion, *United*

[5] It is to be noted, however, that this disagreement did not extend to the other holdings in the *Miller* case that original Indian title had been extinguished in Alaska by the 1867 treaty (159 F. 2d at pp. 1001–1002) and that the only Indian possessory rights to lands in Alaska protected or recognized by Congress were individual rather than tribal (159 F. 2d at p. 1005). Cf. Pet. 6.

States v. *Alcea Band of Tillamooks*, 341 U. S. 48, this Court held that the recovery by the Tillamooks was not grounded upon a taking under the Fifth Amendment.[6] We submit, therefore, that, there being no statutory direction to make payment in this case, and there being, as we shall show below, no "recognition" of the alleged original Indian title, the Court of Claims correctly held the law to be that the "original Indian title" to the lands involved is not compensable.

2. Petitioner contended that its tribal right of occupancy had been "recognized" by Congress by section 8 of the Act of May 17, 1884, 23 Stat. 24, 26, by section 14 of the Act of March 3, 1891, 26 Stat. 1095, 1100, and by section 27 of the Act of June 6, 1900, 31 Stat. 321, 330, 48 U. S. C. 356 (R. 2).[7] It was and is the Government's contention that all tribal interests in the lands had been extinguished by the 1867

[6] The Government's brief in the second *Alcea* case (No. 281, October Term, 1950) sets out at length the reasons for the view that an alleged taking of "original Indian title" cannot be the basis for compensation, absent specific legislative direction.

[7] Section 8 of the Act of May 17, 1884, provides:

"* * * That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress * * *."

Section 14 of the Act of March 3, 1891, provides:

"That none of the provisions of the last two preceding sections of this act shall be so construed as to warrant the

treaty between this country and Russia, and that the subsequent statutes had reference only to the property interests of individuals, Indians and others, in lands actually occupied by them (R. 3–4, 20). This was the holding in *Miller* v. *United States*, 159 F. 2d 997, 1001–1005 (C. A. 9); see also *United States* v. *10.97 Acres of Land in Juneau*, 75 F. Supp. 841, 843–844 (D. Alaska); *United States* v. *Libby, McNeil & Libby*, 107 F. Supp. 697 (D. Alaska). The holding of the *Miller* case, which we submit is correct, would obviate the necessity of any determination as to the compensability of "original Indian title", or as to whether or not Congress had "recognized" or confirmed such an interest in the petitioner. However, the court below, as has already been noted, expressed doubt as to the effect of the 1867 treaty in extinguishing Indian title (R. 20–22), and based its dismissal of the cause on the ground that the statutes relied upon did not

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sale of any lands belonging to the United States * * * to which the natives of Alaska have prior rights by virtue of actual occupation. * * *."

Section 27 of the Act of June 6, 1900, provides:

"The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation, and the land, at any station not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in the se tion, with the improvement thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which the missionary stations respectively belong. * * *."

constitute a "recognition" of any legal rights in the tribe (R. 23–25, 32). Granting for the moment that it was necessary to reach this issue of "recognition", we believe that the court's conclusion is correct. Cf. *Shoshone Indians* v. *United States*, 324 U. S. 335. Rather than indicating any intention to recognize that petitioner had any legal interest in the lands, the statutes were designed merely to preserve the *status quo* with respect to possession, leaving the question of legal rights for future determination. And the Joint Resolution of August 8, 1947, 61 Stat. 920, *infra*, pp. 12–14, demonstrates that the issue, insofar as Congress was concerned, was still an open one.

It is clear, therefore, that whatever may be the rights of individual Indians under the 1884 Act and subsequent legislation in specific areas of land actually occupied by them, the petitioning tribe can have no compensable interest based upon original Indian title, either because such title was extinguished by the 1867 treaty (*Miller* v. *United States*, 159 F. 2d 997, 1001–1002 (C. A. 9)), or, as the court below held, because it has not been recognized by Congress.

3. For these reasons, we believe that the decision below is plainly correct. However, we must acknowledge the impact of the questions presented. There are now pending before the Indian Claims Commission approximately 400 cases, involving some 800 separate claims or causes of

action by Indians in the continental United States. Of these 800 claims, about half involve in some form or other the question of the compensability of "original Indian title."* With specific reference to Alaskan Indians, there is one case pending in the Court of Claims and 12 others in the Indian Claims Commission. Moreover, so long as it is contended that the questions remain unsettled, there may be a cloud upon the title to much of the land in Alaska and its further development may be thereby impeded (see e. g. S. Doc. 159, 80th Cong., 1st Sess.). Both the petitioner (Pet. p. 6) and the Court of Claims (R. 22) have the impression that there is a conflict of views in the executive departments on this matter. In view of the references made by petitioners and the court to the letter of the Attorney General, we print that letter in full in the appendix, *infra*, pp. 14–18. That letter and Committee Print No. 12 of the House Committee on Interior and Insular Affairs, containing recent reports of the Departments of the Interior, Agriculture, and Justice on H. R. 1921, 83rd Cong., a bill to settle possessory land claims in Alaska, make it clear that there is now agreement that no compensable rights flow from unrecognized original Indian title in Alaska or elsewhere.

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* See appendix to the Government's brief in *United States v. Alcea Band of Tillamooks*, No. 281, October Term, 1950, for a detailed list of such cases pending on January 10, 1951, more than six months before the cut-off date for filing claims with the Indian Claims Commission.

CONCLUSION

We believe that the cause was correctly dismissed both on the ground taken by the court below and on the alternative ground adopted by the United States Court of Appeals for the Ninth Circuit in *Miller* v. *United States*, 159 F. 2d 997. However, the Court may be of the opinion that the questions presented are important enough to merit review.

Respectfully submitted.

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PERRY W. MORTON,
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ROGER P. MARQUIS,
JOHN C. HARRINGTON,
Attorneys.

MAY 1954.

APPENDIX

1. Pertinent portions of the Treaty of March 30, 1867, 15 Stat. 539, are as follows:

* * * * *

Article II. In the cession of territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property. * * *

Article VI. * * * The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; * * *

2. The Joint Resolution of August 8, 1947, 61 Stat. 920, provides:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That "possessory rights" as used in this resolution shall mean all rights, if any should exist, which are based upon aboriginal occupancy or title, or upon section 8 of the Act of May 17, 1884 (23 Stat. 24), section 14 of the Act of March 3, 1891 (26 Stat. 1095), or section 27 of the Act of June 6, 1900 (31 Stat. 321), whether claimed by native tribes, native villages, native individuals, or other

persons, and which have not been confirmed by patent or court decision or included within any reservation.

SEC. 2. (a) The Secretary of Agriculture, in contracts for the sale, or in the sale, of national forest timber under the provisions of the Act of June 4, 1897 (30 Stat. 11, 35), as amended, is authorized to include timber growing on any vacant, unappropriated, and unpatented lands within the exterior boundaries of the Tongass National Forest in Alaska, notwithstanding any claim of possessory rights. All such contracts and sales heretofore made are hereby validated.

(b) The Secretary of the Interior is authorized to appraise and sell such vacant, unappropriated, and unpatented lands, notwithstanding any claim of possessory rights, within the exterior boundaries of the Tongass National Forest as, in the opinion of the Secretary of the Interior and the Secretary of Agriculture, are reasonably necessary in connection with or for the processing of timber from lands within such national forest, and upon such terms and conditions as they may impose.

(c) The purchaser shall have and exercise his rights under any patent issued or contract to sell or sale made under this section free and clear of all claims based upon possessory rights.

SEC. 3. (a) All receipts from the sale of timber or from the sale of lands under section 2 of this resolution shall be maintained in a special account in the Treasury until the rights to the land and timber are finally determined.

(b) Nothing in this resolution shall be construed as recognizing or denying the validity of any claims of possessory rights

to lands or timber within the exterior boundaries of the Tongass National Forest.

3. Letter of October 22, 1953, from the Attorney General to the Secretary of the Interior:

Honorable DOUGLAS MCKAY
Secretary of the Interior
Washington, D. C.

MY DEAR MR. SECRETARY: This is in response to your letter of October 9, 1953, concerning the adverse decision in the case of United States v. Libby, McNeill and Libby, in the United States District Court for the Territory of Alaska. The essential issue in this case is the validity of an order of the Secretary of the Interior of November 30, 1949, setting aside an area of 100,000 acres in Alaska as the Hydaburg Indian Reservation pursuant to an Act of May 2, 1936, authorizing the establishment of Indian reservations in Alaska under specified circumstances. Since this action seeks an injunction against the maintenance by the defendant of a fish trap at a particular location at Sukkwan Island, an appeal would be successful only by showing that this area could properly be included in a reservation. I have concluded that such a showing cannot be made in this case. Incidentally, but for the reservation, the area is a part of the Tongass National Forest under the Department of Agriculture. And the defendant's fish trap operation has been continuous since 1927 under a War Department license, and, since 1945, under a special use permit of the United States Forest Service.

The Acting Solicitor General has recommended that no appeal be taken, and

after personal consideration I concur in his recommendation for reasons briefly summarized as follows:

The first category of property which may be reserved under the 1936 Act is an area of land which had been reserved for the use and occupancy of Indians by Acts of 1884 or 1891. The 1884 Act provided that Indians or other persons should not be disturbed in the possession of any lands "actually in their use or occupany", and the 1891 Act refers to lands to which Alaskan natives "have prior rights by virtue of actual occupation." The trial court has found on the evidence that the occupation required by these statutes was not established. The appellate court can, of course, overturn such a finding only if it is clearly erroneous. A thorough examination of the record, however, shows that there is ample support for the findings. For example, the statement in the court's opinion that a census enumerator in 1900 found on Sukkwan Island, which is the size of Manhattan Island, only three persons, a white man, his Tlinget wife and another woman, accurately reflects the nature and substance of the testimony before him.

It has been suggested that rather than actual occupancy, only "aboriginal occupancy"—meaning the roaming of an area for hunting and fishing purposes by aborigines—need be shown. I should like to point out that this is contrary to the language of the statutes which refer to "actual" occupancy, not aboriginal occupancy. In addition, in Miller v. United States, 159 F. 2d 997 (C. A. 9, 1947) the Court of Appeals to which this case would go adopted a contention urged by the

United States on behalf of the Department of the Army that any aboriginal title the Indians in Alaska may have had was extinguished by the Treaty with Russia whereby the United States acquired that territory. Considerable reliance has been placed upon the decision in the Miller case in the defense of suits against the United States before the Indian Claims Commission, and I do not believe this consistent position should be reversed. But apart from this, the language of the statutes here involved precludes reliance upon aboriginal occupancy.

The 1936 Act also authorizes the reservation of land "which has been heretofore reserved under any Executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof". It appears that 189 acres were withdrawn from the National Forest in 1927 as a townsite for the Village of Hydaburg and a patent under the townsite laws was issued in 1933 to an employee of the General Land Office in trust for the individual inhabitants of the village, whether Indian or white. The district court has held that this portion of the 1936 Act contemplated an area set aside by Executive Order as a reservation for Indians as a tribe or group and that neither the 1927 withdrawal nor the townsite patent created such a reservation. It does not appear that this holding is erroneous, and, in any event, the village is located some 12 miles from the area immediately involved in the present case.

The 1936 Act also authorizes the reservation of "additional public lands adjacent thereto". This provision becomes appli-

cable only if a base is provided of lands in the earlier categories, to which the additional public lands are adjacent. Even if the townsite might be considered to furnish such a base, the court's conclusion that the area of 100,000 acres was not "adjacent" to the 189 acre townsite cannot be said to be clearly erroneous. In this connection the fact is important that the area containing the fish trap with which this case is concerned is on the side of an island furthest from the Village of Hydaburg, which is across a strait from the island.

Thus the particular circumstances of this case fail to show a reasonable basis for seeking reversal of the judgment. In my opinion the decision of the district court would be affirmed by the Court of Appeals on grounds which would not be reviewed and reversed by the Supreme Court. It by no means follows that I agree with all that is said in the district court's opinion. Moreover I do not believe that this decision would establish the invalidity of the other reservations in Alaska since each case turns on its own facts.

Finally, it must be borne in mind that the result of the decision is that the area remains property of the United States as part of the Tongass National Forest and is subject to use and disposition under applicable legislation. And, in any event, no permanent sacrifice of rights of the Indians will result from this decision, since, under Hynes v. Grimes Packing Co., 337 U. S. 86 (1949), a reservation of lands under the 1936 Act is merely temporary and is not a grant of vested rights to the Indians.

I trust that this summary makes clear my reasons for concluding that an appeal should not be taken in this case. I sincerely regret that I am unable to give you a more favorable reply.

Sincerely,

(Signed) HERBERT BROWNELL, Jr.,
Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1954